U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DARRYL L. JOHNSON and U.S. POSTAL SERVICE,
POST OFFICE, Miami, FL

Docket No. 99-331; Submitted on the Record;
Issued August 8, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant has met his burden of proof in establishing that he sustained an injury in the performance of duty on July 22, 1996, as alleged; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing under section 8124 of the Federal Employees' Compensation Act.

On July 23, 1996[1] appellant, then a 35-year-old mail carrier, filed a notice of traumatic injury (Form CA-1), alleging that he suffered a low back injury when "stepping out of the vehicle on a stop, still." On the reverse side of the form, his supervisor controverted appellant's claim stating, "Employee has no reasonable explanation as to why he failed to report the accident immediately. When questioned he states it was not job related."

Accompanying appellant's claim was an August 2, 1996 form report by Dr. Carlos D. Carranza, who reported his findings on examination of left lumbar muscle spasm, stated that x-rays of the lumbosacral spine were normal and upper GI series were normal. He diagnosed low back pain and indicated that appellant should perform light duty for two weeks; an August 5, 1996 statement from appellant's supervisor. She stated, "I said to [appellant] on July 29, 1996 I ask[ed] you was this a job-related injury? You then stated that it was not. On August 5, 1996 you stated that it was a recurrence injury. After I told [appellant] that we did not have light-duty work based on his limitation he then stated that it was a new injury and he wanted to fill out a form for injury on the job. [Appellant] came in Tuesday, August 6, 1996 again requesting light-duty forms;" an August 2, 1996 return to work certificate by Dr. Carranza indicating that appellant had been under his care from July 23 to August 2, 1996, for low back pain and that appellant was able to return to work on light-duty work on August 5, 1996;" an August 12, 1996 letter from the employing establishment challenging appellant's claim. The employing establishment stated that "[Appellant] waited to file his claim until August 5, 1996. According to his supervisor, Patricia A. Coney's, statement he did not file the CA-1 claiming his condition was work related until he was informed there was no light-duty available." The employing

[1] The employing establishment stated that it received appellant's CA-1 form on August 5, 1996.

establishment also stated that "The medical documentation received does not indicate that [appellant's] condition was caused by an incident at work. It only states diagnosis of 'low back pain;'" and an August 2, 1996 medical clearance to return to duty by Dr. Carranza. Dr. Carranza indicated that appellant was fit for light duty with restrictions of lifting no more than 15 pounds and no stooping, kneeling, repeated bending, climbing or operating a motor vehicle and industrial equipment, as of August 5, 1996. He indicated that appellant could return to full duty with no restrictions, effective August 19, 1996.

By letter dated August 27, 1996, the Office requested detailed factual and medical information from appellant.

On August 28, 1996 the record was supplemented with an August 14, 1996 duty status report, Form CA-17, from Dr. Carranza, who diagnosed low back pain and stated that appellant could perform light-duty work effective August 5, 1996.

On December 5, 1996 the record was supplemented with September 13 and 26 and October 8, 1996 duty status reports. On September 13, 1996 Dr. Carranza diagnosed low back pain, and that appellant could return to work with restrictions as of September 13, 1996. On September 26, 1996 Dr. Melvyn H. Rech diagnosed lumbosacral strain/sprain and that appellant could return to work with restrictions; and on October 8, 1996 Dr. Rech's diagnosis was the same and he indicated that appellant could work with restrictions.

By decision dated September 30, 1996, the Office found the evidence of record failed to demonstrate that the employee sustained an injury as alleged. Therefore, fact of injury was not established.

By letter dated August 27, 1997, appellant, through his recently retained representative, requested reconsideration of the Office's September 30, 1996 decision. In support of the request, appellant submitted medical forms indicating that appellant underwent lumbar epidural steroid injections; a May 28, 1997 report by Dr. Rech, who stated that he initially saw appellant on September 5, 1996 for low back pain. He also stated that "The patient stated that on July 22, 1996 while at work, he made an awkward step and twisted his back. Appellant began hyperventilating after lifting a package. He subsequently was treated by his HMO for gastric problems and low back problems. The pain persisted and he was referred to me." Dr. Rech stated that "The patient was last examined in my office on April 8, 1997. This was the day following his last epidural steroid injection. [Appellant] stated that he experience low back pain and spasms when lifting. He also stated that he experienced pain in the left leg while working. The patient was on light duties." Dr. Rech reported his findings on examination stating that "Examination revealed that [appellant] walked with a guarded gait. Dorsolumbar motion positive for low back discomfort. The tension tests were positive for low back discomfort. Laugier's negative. There was positive Tripod sign;" an August 21, 1997 certification (under the Family and Medical Leave Act of 1993) of health care provider by Dr. Carranza, who described the medical facts as anhedonia, abulin, apathy, impaired attention and concentration, overwhelming sadness. Also, shortness of breath, palpitations and fear of losing his mind. He indicated that appellant should be on light duty for approximately six months and would need to be treated by a phychologist;" a July 15, 1997 return to work medical clearance by Dr. Rech indicating that appellant could return to work on light duty; a July 15, 1997 report by Dr. Rech diagnosing appellant with lumbar sacral strain/sprain; and an August 22, 1997 statement from Dr. Rech stating, "Please note that, based on my findings, [appellant's] injuries consistent with

the history of an awkward step which caused him to twist his back while at work on July 22, 1996."

By decision dated September 23, 1997, the Office denied appellant's August 27, 1997 request for reconsideration finding that the evidence of record was insufficient to warrant modification of the prior decision.

By letter dated April 10, 1998, appellant, through his representative, requested reconsideration of the Office's September 23, 1997 decision. In support of the request, appellant submitted an October 19, 1997 statement from appellant and a December 10, 1997 statement from Dr. Carranza, who stated that he saw appellant on July 23 and 30 and August 6, 1996, that there were no positive findings and he referred appellant to an orthopedist. In his statement, appellant stated that after working on the street he told his supervisor that "I loosened my belt and I think that [i]s why my back was hurting and I felt pressure in my back." Appellant denied telling his supervisor that his injury was not job related.

By decision dated April 29, 1998, the Office denied appellant's April 10, 1998 request for reconsideration of the Office's September 23, 1997 decision, finding that the evidence of record was insufficient to warrant modification of the prior decision.

By letter dated May 14, 1998, appellant requested an oral hearing before an Office hearing representative.

By decision dated June 24, 1998, the Office's Branch of Hearings and Review denied appellant's request on the grounds that he had previously requested reconsideration and as a matter of right, was not entitled to an oral hearing on the same issue. Also, the Office, in exercising its discretion, determined that the issue in this case could equally well be addressed by requesting reconsideration from the Office and submitting evidence not previously considered which established that he sustained an injury as claimed.

The Board finds that appellant failed to meet his burden of proof in establishing that he sustained an injury in the performance of duty on July 22, 1996.

An employee seeking benefits under the Act[2] has the burden of establishing the essential elements of his or her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was filed within the applicable time limitations of the Act.[3] An individual seeking disability compensation must also establish that an injury was sustained at the time, place and in the manner alleged,[4] that the injury was sustained while in the performance of duty,[5] and that the disabling condition for which compensation is claimed was caused or aggravated by the individual's employment.[6] These are

[2] 5 U.S.C. §§ 8101-8193.

[3] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[4] *Robert A. Gregory*, 40 ECAB 478 (1989).

[5] *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[6] *Steven R. Piper*, 39 ECAB 312 (1987).

the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or occupational disease.[7]

In a traumatic injury case, the employee must establish by the weight of reliable, probative and substantial evidence that the occurrence of an injury is in the performance of duty at the time, place and in the manner alleged and that the injury resulted from a specific event or incident.[8] The Office cannot accept fact of injury if there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.[9]

In order to determine whether an employee actually sustained an injury in the performance of duty, the Office begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred. In this case, the Office found that there were such inconsistencies in the evidence to cast doubt that the incident occurred as alleged. The Board finds that there are sufficient inconsistencies to cast doubt on the validity of appellant's claim. Appellant, on his claim form stated that on July 22, 1996 while "stepping out the vehicle on a stop" he experienced stomach and back pain and it was hard to breath. In an October 19, 1997 statement, appellant stated that, "On July 22, 1996 when I came in the office after working on the street, I stated to Patricia Coney, "I loosened by belt, and I think that [i]s why my back was hurting and I felt pressure in my back. She (Patricia Coney) stated "you are getting fat." Appellant never mentioned that he took an awkward step out of his vehicle or injured himself. He failed to report the alleged incident for about a week (on July 29, 1996 appellant's supervisor asked if it was job related), told his supervisor that it was not a job-related injury, and the evidence of record supports that the first time a history of injury was given to a doctor was on September 5, 1996 to Dr. Rech, who stated that [appellant] stated that on July 22, 1996 while at work he made an awkward step and twisted his back. He began hyperventilating after lifting a package." Although appellant saw Dr. Carranza the day after the alleged incident, he never mentioned taking an awkward step out of his vehicle that caused stomach and back pain. Although appellant was advised by letter dated August 27, 1996 that to establish his traumatic injury claim he needed to submit a medical report which included a history of the injury, a diagnosis of the condition resulting from the injury and a rationalized medical opinion on the causal relationship, if any, between the alleged work injury and the condition for which he was being treated, such evidence was not submitted.

The second component of fact of injury is whether the employment incident caused a personal injury and generally can be established only by medical evidence. To establish a causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background, supporting such a causal relationship.[10]

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[7] *David J. Overfield*, 42 ECAB 718 (1991); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[8] *See Joshua Fink*, 35 ECAB 822, 823-24 (1984).

[9] *Eric J. Koke*, 43 ECAB 638 (1992); *Mary Joan Coppolino*, 43 ECAB 988 (1992).

[10] *Kathryn Haggerty*, 45 ECAB 383 (1994); *see* 20 C.F.R. § 10.110(a).

In this case, there is no rationalized medical opinion evidence based on a complete and accurate factual and medical background supporting that the alleged July 22, 1996 incident resulted in a personal injury. None of the contemporaneous medical evidence included a history of the July 22, 1996 alleged incident.

In view of the inconsistencies in appellant's statements regarding how he sustained his injury and the lack of rationalized medical opinion evidence, the Board finds that appellant has failed to meet his burden of proof in establishing that he sustained an injury to his back in the performance of duty on July 22, 1996, as alleged.

The Board further finds that the Office properly denied appellant's request for a hearing under section 8124 of the Act.

Section 8124(b)(1) of the Act,[11] concerning a claimant's entitlement to a hearing by an Office representative, provides in pertinent part: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary … is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[12] As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing,[13] a claimant is not entitled to a hearing or a review of the written record as a matter of right if he has requested reconsideration under section 8128(a) of the Act prior to requesting a hearing before an Office hearing representative.

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[14] Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing,[15] when the request is made after the 30-day period for requesting a hearing[16] and when the request is for a second hearing on the same issue.[17] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.[18]

[11] 5 U.S.C. § 8124(b)(1).

[12] 5 U.S.C. § 8124(b)(1).

[13] *Ella M. Garner*, 36 ECAB 238 (1984); *Charles E. Varrick*, 33 ECAB 1746 (1982).

[14] *Henry Moreno*, 39 ECAB 475, 482 (1988).

[15] *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

[16] *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

[17] *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

[18] *Henry Moreno*, *supra* note 14.

In the present case, appellant had previously requested reconsideration on August 27, 1997 and April 10, 1998. The Office denied appellant's requests for reconsideration on September 23, 1997 and April 29, 1998. The Office properly exercised its discretion by finding that appellant could have the issue of whether he sustained an injury as claimed be considered equally well by submitting new, relevant evidence and requesting reconsideration. As the only limitation on discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from known facts.[19] For these reasons, the Office properly denied appellant's request for a hearing under section 8124 of the Act.

The decisions of the Office of Workers' Compensation Programs dated June 24 and April 29, 1998 and September 23, 1997 are affirmed.

Dated, Washington, D.C.
August 8, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

[19] *Daniel J. Perea*, 42 ECAB 214 (1990).